

*United States Court of Appeals  
for the Second Circuit*



**APPELLEE'S BRIEF**



74-2374

To Be Argued By  
A. SETH GREENWALD

B P/5

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----X  
PIETRO C. RUBINO, for himself and all other persons similarly situated, et al., :  
Plaintiffs-Appellants, :  
HARRY T. NUSBAUM, :  
Plaintiff-Intervenor-Appellant, :  
-against- :  
JOHN J. GHEZZI, et al., :  
Defendants-Appellees. :  
-----X

BRIEF FOR DEFENDANT-APPELLEE  
GHEZZI AND ATTORNEY GENERAL  
PRO SE

LOUIS J. LEFKOWITZ  
Attorney General of the  
State of New York  
Attorney for Defendant-Appellee  
Ghezzi and Pro Se  
Office and P.O. Address  
Two World Trade Center  
New York, New York 10047  
Tel. (212) 488-3396

SAMUEL A. HIRSHOWITZ  
First Assistant Attorney General

A. SETH GREENWALD  
Assistant Attorney General  
Of Counsel



TABLE OF CONTENTS

	<u>Page</u>
Question Presented.....	1
Statement.....	1
State Constitution and Statute Involved.....	2
Facts.....	3
Opinion Below.....	4
 POINT I - NO SUBSTANTIAL FEDERAL QUESTION WAS PRESENTED BY THE MANDATORY PROVISION FOR RETIREMENT OF JUDGES IN NEW YORK AT THE AGE OF SEVENTY..	5
A. Mandatory retirement at age 70 or lower presents no substantial federal question.	6
 POINT II - THE MANDATORY RETIREMENT PROVISION IS RATIONAL AND NEED NOT BE SUB- JECTED TO STRICT SCRUTINY.....	10
B. Strict scrutiny does not apply to age retirement provisions.....	18
 POINT III - LIMITED CONTINUATION OF SUPERIOR COURT JUDGES TO AGE 76 RAISES NO SUBSTANTIAL EQUAL PROTECTION CLAIM.....	26
Conclusion.....	27

TABLE OF AUTHORITIES

Cases

<u>Ahern v. Murphy</u> , 457 F. 2d 363 (7th Cir., 1972)...	8
<u>Air Line Pilots Ass'n. Int'l. v. Quesada</u> , 276 F. 2d 892 (2d Cir., 1960) cert. denied, 366 U.S. 962....	20, 22
<u>Armstrong v. Howell</u> , 371 F. Supp. 48 (D. Neb. 1974).	20, 22
<u>Arnett v. Kennedy</u> , ____ U.S. ___, 40 L. Ed. 2d 15..	6, 9
<u>Beck v. McLeod</u> , 240 F. Supp. 708 (E.D.S.C. 1965), aff'd. 382 U.S. 454 (1966).....	8

	Page
<u>Burks v. Perk</u> , 470 F. 2d 163 (6th Cir. 1972), cert. denied 412 U.S. 905.....	23
<u>Cafeteria Workers v. McElroy</u> , 367 U.S. 886 (1961) .....	18
<u>Chimento v. Stark</u> , 353 F. Supp. 1211 (D.N.H. 1973), aff'd. 414 U.S. 802.....	25
<u>Cleveland Board of Education v. LaFleur</u> , 414 U.S. 632 (1974).....	7, 21
<u>Frontiero v. Richardson</u> , 411 U.S. 677 (1973).....	21
<u>Gates v. Collier</u> , 349 F. Supp. 881 (S.D.N.Y. 1972). .	8
<u>Gordon v. Leatherman</u> , 325 F. Supp. 494 reversed 450 F. 2d 562 (5th Cir., 1972).....	9, 23
<u>Human Rights Party v. Secretary of State</u> , 370 F. Supp. 921 (E.D. Mich. 1973).....	25
<u>Jefferson v. Hackney</u> , 406 U.S. 535 (1972).....	17
<u>Kahn v. Shevin</u> , ____ U.S. ___, 40 L. Ed. 2d 189 (1974).....	21
<u>Kanapaux v. Ellison</u> , ____ U.S. ___, 43 L.W. 3238 (10/22/74).....	25
<u>McDonald v. Board of Election Commissioners</u> , 394 U.S. 802 (1969).....	27
<u>McIlvaine v. Pennsylvania</u> , 6 Pa. Cmwlth, 505, 296 A. 2d 630 (1972), aff'd 309 A. 2d 801 (1973).....	7, 21
<u>McIlvaine v. Comm. of Pennsylvania</u> , 415 U.S. 986 (1974).....	6,7,8,9,20,21
<u>Murgia v. Comm. of Massachusetts Bd. of Retirement</u> , 376 F. Supp. 753 (D. Mass. 1974).....	8
<u>Ohio ex rel. Eaton v. Price</u> , 360 U.S. 246 (1959)...	8
<u>Port Authority Bondholders Protective Committee v. Port of New York Authority</u> , 387 F. 2d 259 (1967)...	8
<u>Reed v. Reed</u> , 404 U.S. 71 (1971).....	21
<u>Retail Clerks Union, Local 770 v. Retail Clerks Int'l Ass'n.</u> , 359 F. Supp. 1285 (C.D. Calif. 1973). .	20, 22

	<u>Page</u>
<u>Rosario v. Rockefeller</u> , 410 U.S. 752 (1973).....	24
<u>Seligman v. Cohn</u> , 179 Misc. 117 (Sup. Ct., Queens Co. 1942), aff. 264 App. Div. 959 (2d Dept. 1942), aff. 289 N.Y. 631 (1942).....	6
<u>Vlandis v. Kline</u> , 412 U.S. 441 (1973).....	20
<u>Weisbrod v. Lynn</u> , 494 F. 2d 1101 (D.C. Cir., 1974), on remand, ____ F. Supp. ___, L.W.....	6,7,8,9
<u>Weiss v. Walsh</u> , 324 F. Supp. 75 (S.D.N.Y. 1971), aff'd. 461 F. 2d 846 (2d Cir. 1972), cert. denied, 409 U.S. 1129.....	19, 22
<u>Williams v. Rhodes</u> , 393 U.S. 23 (1968).....	23
<u>Williamson v. Lee Optical Co.</u> , 348 U.S. 488 (1955). 22, 27	

Constitution and Statutes United States

Economy Act of 1932, Pub. L. 72-212, 47 Stat. 404..	16
5 U.S.C. § 8335.....	6, 11
28 U.S.C. §§ 2281, 2284.....	6
29 U.S.C. §§ 621, 631.....	20

State

Civil Service Law (N.Y.) § 75.....	10
Constitution (N.Y.) Art. 6 § 15.....	3
Constitution (N.Y.) Art. 6 § 20(a).....	25
Constitution (N.Y.) Art. 6 § 25(b).....	2,3,8,24,25
Constitution (N.Y.) Art. 6 § 26(b)(g).....	26
Executive Law (N.Y.) §§ 296(1) and (3)-a.....	19
Judiciary Law (N.Y.) § 23.....	3, 8
Pennsylvania Admin. Code § 205(d) of 1929.....	7

	<u>Page</u>
<u>Miscellaneous Authorities Congressional Materials</u>	
50 Cong. Rec. 6286, <u>et seq.</u> .....	13
59 Cong. Rec. 2501-2502, 6290-6291, 6289, 6371 <u>et seq.</u> .....	12, 14
House Committee on the Civil Service, 77th Cong., 1st Sess. 43 (1941), Hearings.....	15
Senate Report No. 99, 66th Cong. 1st Sess. 2, 3 (1919).....	11, 12
Senate Committee on Appropriations, 72nd Cong., 1st Sess. 78 (1933); Hearings.....	16
Senate Document No. 14, 90th Cong., 1st Sess. 73 (1967).....	16
<u>Others</u>	
New York Times, November 2, 1973 p. 40 (Editorial). Opinions of the (N.Y.) Attorney General (1964), 76.....	26 5

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----X  
PIETRO C. RUBINO, for himself and all other persons similarly situated, et al., :  
Plaintiffs-Appellants,  
HARRY T. NUSBAUM, :  
Plaintiff-Intervenor-  
Appellant, :  
-against- :  
JOHN J. GHEZZI, et al., :  
Defendants-Appellees.  
-----X

BRIEF FOR DEFENDANT-APPELLEE  
GHEZZI AND ATTORNEY GENERAL  
PRO SE

Question Presented

Did the mandatory retirement provision for judges in New York present a substantial federal question?

Statement

This is an appeal of an opinion and order of District Judge Griesa of the Southern District, October 18, 1974, refusing to convene a three-judge court and dismissing the complaint (A-21)\* et seq.

\*Numbers in parenthesis refer to pages in Joint Appendix.

At the hearing on October 18, 1974, Judge Harry T. Nusbaum was granted plaintiff-intervenor status (A 23).

The Attorney General, besides representing defendant Ghezzi appears pro se pursuant to N.Y. Executive Law § 71 in defense of the constitutionality of the challenged sections of the New York State Constitution and Judiciary Law.

Both plaintiffs and intervenor have appealed from the dismissal of the complaint in that action.

Appellants claim the mandatory retirement deprives them of several rights under the First and Fourteenth Amendments to the United States Constitution. These claims include freedom of speech, due process and equal protection of the laws.

State Constitution and  
Statute Involved

New York Constitution

Art. 6, § 25(b):

"b. Each judge of the court of appeals, justice of the supreme court, judge of the court of claims, judge of the county court, judge of the surrogate's court, judge of the family court, judge of a court for the city of New York established pursuant to section fifteen of this article and judge of the district court shall retire on the last day of December in the year in which he reaches the age of seventy." (Pertinent part)

Judiciary Law (N.Y.)

"§ 23. Age limitation on term of judicial office

No person shall hold the office of judge, justice or surrogate of any court, whether of record or not of record, except a justice of the peace of a town or police justice of a village, longer than until and including the last day of December next after he shall be seventy years of age, except that a judge or justice in office or elected or appointed to office at the effective date of this section, as to whom no provision limiting his right to hold office to the close of the year following his attaining the age of seventy years was applicable prior to the effective date of this section, may continue in the office during the term for which he was elected or appointed."

Facts

The relevant facts in the complaint are that plaintiff-appellant Judge Philip J. Zichello\* was elected a Judge of the Civil Court for a term starting January 1, 1970. Normally that term is for 10 years, N.Y.S. Const., Art. 6, § 15, subsec. a, but since the Judge was born November 1, 1904, the State Constitution, Art. 6, § 25 and Judiciary Law § 23, mandate his

\*The other named plaintiff Rubino, is a voter over 70 who alleges he voted for Judge Zichello. This has no necessary relevance to the Judge's complaint, although appellants claim violation of First Amendment rights.

retirement at the end of this year, 1974, as he had attained 70 years.

As there was a vacancy in the office beginning January 1, 1975, an election was held November 5, 1974 to fill that vacancy. There were two candidates.\*

Opinion Below

Judge Griesa, in his decision rendered from the bench, found no substantial federal question and, as noted, dismissed the complaint. (A 21-A 27) No case under the First Amendment could reasonably be interpreted as preventing the State of New York from establishing terms for elected judges and providing for retirement. He saw no equal protection in the claim that Supreme Court and Court of Appeals judges could be certificated for continued service to age 76 if their services are necessary and they are fit while appellant Judges could not. It was seen as a minor differentiation between two distinct categories of judges.

\*The plaintiff had not joined these candidates in that election already past, although they had the most immediate interest in this lawsuit.

POINT I

NO SUBSTANTIAL FEDERAL QUESTION  
WAS PRESENTED BY THE MANDATORY  
PROVISION FOR RETIREMENT OF JUDGES  
IN NEW YORK AT THE AGE OF SEVENTY.

Appellant Judge Zichello claimed that his constitutional rights were violated by mandatory retirement at age 70. This is premised on the factual assumption that he was elected for a ten-year term starting January 1, 1970. Contrary to the allegations of paragraph "4" of the complaint, (A-5) Exhibit "A" to the Complaint (Certificate of Election) showed that Zichello was elected a Justice (sic) of the Civil Court. There was no mention of the length of the term. By law he was not elected to a ten-year term, but rather a term which expired at the end of the year he reached 70. Judiciary Law, § 23.

This simple fact is evidenced by 1964 Opinions of the Attorney General, p. 76. In discussing the term of office of a Surrogate, who had reached 70, the opinion said (77):

"In view of the foregoing, it is my opinion that the term of the present incumbent of the office of Clinton County Surrogate terminates..."

The headnote states "mandatory retirement of judicial officers causes the term of office to be shortened..."

By law and on the facts, the appellant Judge was not elected to a ten-year term but to one shortened by the mandatory retirement provision.

Judge Zichello had been aware of necessity of the length of his term since entering office in 1970. Judiciary Law § 22 required him within 10 days after assuming his duties to file a certificate stating "the year in which he was born and the time when his official term will expire by completion of a full term or by reason of the disability of age prescribed in section twenty-three of this chapter." See Seligman v. Cohn, 179 Misc. 117 (Sup. Ct., Queens Co., 1942), aff. 264 App. Div. 959 (2d Dept. 1942); aff. 289 N.Y. 631 (1942).

A. Mandatory retirement at age 70 or lower presents no substantial federal question

Plaintiffs contended that this action requires the convening of a three-judge court, 28 U.S.C. §§ 2281, 2284. This was premised on the decision in Weisbrod v. Lynn, 494 F. 2d 1111 (D.C. Cir., 1974), which remanded the mandatory federal civil service retirement for 70 year olds, 5 U.S.C. § 8335, for the convening of a three-judge court. However, this decision was rendered on March 11, 1974 without benefit of the Supreme Court's recent decisions in McIlvaine v. Comm. of Pennsylvania, 415 U.S. 986 (March 25, 1974) and Arnett v. Kennedy, \_\_\_\_ U.S. \_\_\_, 40 L. Ed. 2d 15 (April 16, 1974).

The three-judge court in Weisbrod v. Lynn, No. 2465-72 (D.D.C.) in an opinion dated October 11, 1974, dismissed the action based on the Supreme Court dismissal of the appeal in McIlvaine v. Pennsylvania, 415 U.S. 986, "for want of a substantial federal question." Plaintiff in Weisbrod mounted the usual panoply of lawyer's arguments that McIlvaine was distinguishable or otherwise not controlling. However the three-judge court accepted the Supreme Court's dismissal in McIlvaine as dispositive and necessitating dismissal. The Weisbrod court was convinced that the Supreme Court was "certainly not ignorant of the due process issue before it."

The Weisbrod court clearly felt Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) was not applicable to mandatory retirement.

McIlvaine v. Pennsylvania, supra, considered Penn. Admin. Code § 205(d) of 1929, which required most state policemen in Pennsylvania to resign at the age of 60. Both the lower state court, 296 A. 2d 630 (1972), and the Supreme Court of Pennsylvania, 309 A. 2d 801 (1973), had upheld the provision's constitutionality. On appeal the question presented to the United States Supreme Court was "Whether § 205 of the [Pennsylvania] Administrative Code, as amended, which mandates retirement of Pennsylvania State Policemen at the age of sixty (60)

violates the equal protection clause." It was urged that the provision did not take into consideration the policemen's ability to perform the services required. Nevertheless the Supreme Court dismissed the appeal "for want of a substantial federal question", supra, 415 U.S. 986.\* In similar fashion, plaintiffs' challenge to the constitutionality of Art. 6, § 25(b) of the New York Constitution and Judiciary Law § 23 fails to present a substantial federal question.\*\*

\* Dismissal for want of a substantial federal question is the substantive equivalent of affirmance. To quote Justice Brennan in Ohio ex rel. Eaton v. Price, 360 U.S. 246, 247 (1959): "Votes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case...." See also, Ahern v. Murphy, 457 F. 2d 363, 364 (7th Cir., 1972) quoting the Second Circuit in Port Authority Bondholders Protective Committee v. Port of New York Authority, 387 F. 2d 259, 262 (1967). Similarly a three-judge court which has already been convened, will dismiss a complaint if the court determines that the Supreme Court has already dismissed an analogous case for want of a substantial federal question. Beck v. McLeod, 240 F. Supp. 708 (E.D.S.C. 1965), affd. 382 U.S. 454 (1966); Gates v. Collier, 349 F. Supp. 881 (S.D.N.Y. 1972); Weisbrod v. Lynn, (three-judge court), supra.

\*\*The decision in Murgia v. Comm. of Massachusetts Bd. of Retirement, 376 F. Supp. 753 (D. Mass, 1974) fails to note McIlvaine. However Murgia involved 50 year old retirement and noted at 756, ftn. 9 the probable validity of 70 year old retirement. Retirement at 70 presents an entirely different picture.

Relevant also is the mandatory physical examination required every year after 40 for a Massachusetts State Policemen. Murgia, supra at 754, 756.

Judge Zichello also failed to present a substantial federal question because he basically must accept the political system as he finds it. The same Constitution and laws which create his office can set conditions of service. This is the basic holding of Arnett v. Kennedy, supra, 40 L. Ed. 2d 15, 32.

In citing Gordon v. Leatherman, 450 F. 2d 562 (5th Cir., 1972) appellants (Br. p. 28-29) make the same error on which the 5th Circuit reversed the District Court (325 F. Supp. 494). While an elected official has a property right in his office, "it is also true that an official takes his office subject to the conditions imposed by the terms and nature of the political system in which he operates." Gordon, at 565.

The attempt to distinguish Weisbrod and McIlvaine on the ground that plaintiff judges were elected is to argue that mandatory retirement is proper for Family Criminal Court and Court of Claims Judges, but not Civil Court judges. This is a distinction that is ludicrous. The status of lower court judges has more community of interest than the grouping proposed by appellants.

In fact the amicus status on this appeal for various associations of appointed judges and retired persons generally points up that retirement is in issue, not right to elective public office.

POINT II

THE MANDATORY RETIREMENT PROVISION  
IS RATIONAL AND NEED NOT BE SUB-  
JECTED TO STRICT SCRUTINY.

As appellants must concede, the provision for mandatory retirement, whether for civil servants or judges is not peculiar to New York. See appellants' appendix at end of brief.

While the legislative history of the mandatory retirement for Judges in New York at age 70 seems scant, it seems to be a reflection of the fact that judges are elected for a long term of office in New York (10 years for Civil Court Judges) and are, by practice, in most instances renominated by all parties for reelection. This is similar, in effect, to civil service tenure. Civil Service Law (N.Y.) § 75. Thus superannuated Judges would be a recurring problem.

Given the practice of life-time tenure, the efficient operation of government virtually requires some system of mandatory retirement.\* The United States Congress

\*That elected executive and legislative official need not retire can be fully justified in the fact that they must face the electorate much more frequently -- normally every 2 or 4 years. See appellants Br., p. 3. Also the nature of the offices are entirely different, warranting legislative distinction. If appellant Judges desire to continue in public service after 70, for such executive or legislative offices, they are free to run for such offices.

has passed a mandatory seventy (70) year old retirement provision (5 U.S.C. § 8335) which serves several purposes, sufficient to support New York's similar provision for retirement of judges, such as appellant Zichello and Nusbaum at age 70.

As stated by the Senate Committee on Civil Service and Retrenchment in reference to S 1699, which subsequently became Pub. L. 66-215:

"The main purposes to be accomplished by such legislation are:

- (1) Greater efficiency and economy in the Government service; and
- (2) A moderate provision for the material welfare of those who, by result of length of service and their inability to render full or efficient service, are obliged to retire." S. Rep. No. 99, 66th Cong., 1st Sess. 2 (1919).

The Committee further recognized:

"It has long been patent that, in the various administrative branches of the Government, employees have been retained long after they had, by reason of age and bodily infirmity, ceased to be efficient. The law having made no provision for their support in whole or in part during their declining years, the heads of departments and bureaus have through sympathy kept many aged employees in the nominal service of the Government and their names on the payroll. The real work of the position, in such cases, has devolved on others and younger employees. This, of course, has resulted in loss to the Government, and it would appear that in some cases the equivalent of two salaries has been, or is, being paid for

that service for which the compensation should have been but one salary. Of course, work done by those whose faculties are impaired by reason of age is not as a rule efficiently done, and the Government in this respect sustains a loss difficult to estimate." Id.

Finally, the Committee emphasized the manner in which the inefficiency of the existing practice served to undermine the public interest:

"The system is a vicious one, both from the standpoint of economy and efficiency. To the extent that the employee, drawing the regular salary which his position commands, is unable to perform fully or efficiently the work of the average person in a like position, such employee is a pensioner of the Government and, as above indicated, the attention of your committee has been called to many cases where the service rendered by the employee was so slight that he is practically a pensioner to the full amount of his salary.

\* \* \*

"Any system which permits the public business to be carried on without fulfilling this requirement is unjust to the public." Id., at 3.

See, also, 59 Cong. Rec. 2501-2502, 6290-6291 (1920); S. Rep. No. 99, 66th Cong., 1st Sess. 3 (1919).

Also of importance to the Congress (and New York) in establishing a mandatory retirement system was the concern that younger members of the civil service or lawyers seeking judicial office would otherwise be denied opportunity for advancement and promotion or election. As Senator Sterling observed:

"The younger men and women are interested too [in the retirement system]. And why? Because the retention in the service of the aged and inefficient denies them their right to advancement and promotion in the service." 59 Cong. Rec. 2501.

See, also, 50 Cong. Rec. 6286, 6295. Without mandatory retirement, "it simply means that the recruit for the service, learning the facts surrounding his employment and seeing the concrete proofs that the calling holds no future, leaves it as soon as possible." 50 Cong. Rec. 6297.\*

It was with these basic purposes in mind that Congress created a retirement system. In setting the mandatory retirement age at 70 years, Congress and New York has extended the employment of its superannuated employees beyond the age found in many European civil service retirement systems. (The

\*To this extent judicial service partakes of a system wherein lawyers can seek a position on the Civil Court, and advance to a higher court.

judiciary there is often a part of the civil service). See 59 Cong. Rec. 6289. Congress allowed certain exceptions to the general age limit of 70 years in recognition of the fact that some type of work by nature of their physical demands required retirement at an earlier age. See 59 Cong. Rec. 5169, 6289, 6766. Similarly New York allows extension of the service of State Supreme Court Justices and Court of Appeals judges (to sit as Supreme Court Justices) because recognition of their greater experience warrants augmenting this branch of the judiciary. They are certificated, and not regular Justices. (See Point III infra).

Moreover, in establishing this retirement system, Congress (and the State) was also aware that the general rule might result in the mandatory retirement of employees who remained fit and efficient despite their age. Nonetheless, Congress, as the following colloquy between Representatives Hastings and Lehlbach illustrates, determined that an across-the-board approach was the only practicable way of achieving its objectives:

"Mr. Hastings: Suppose a man is efficient and you add the four years [of extension] to the 62 [age of retirement] making it [mandatory retirement] 66 for a rural carrier, but he is still efficient at that time, you then provide for his retirement?

"Mr. Lehlbach: Of course, there must be some limit. You cannot legislate so that every single instance in over 300,000 employees can be taken care of, but you can use your judgment and try to legislate so that the great bulk of them will be properly included." 59 Cong. Rec. 6371.

The continuing need for a mandatory system of retirement, as established by the early 1920 legislation, has been repeatedly recognized by the federal Congress. As explained by a spokesman for the National Civil Service Reform League before the House Committee on the Civil Service (commenting on New York experience):

"We have found that 70 years of age for compulsory retirement is sound. As a matter of fact we have had an interesting experience in New York recently, in that the law has been changed to permit the civil-service commission to allow persons beyond 70 who are in good physical and mental condition to continue in active service, subject to a showing of special need for the services of a particular individual. That has been the saddest experience we have had in a long time, because it opened the floodgates to imposition upon the public service itself, in that everybody concerned has been imposing upon his friends in official or prominent position to effect retention in the service beyond

70 years of age. That possibility has been unfair to the service as well as to the individual. I do not mind saying that it was a shortsighted policy on the part of public employees in requesting that privilege. Many have not lived long enough to receive the pensions for which they had hoped. Now the demand is just the other way -- that there be compulsory retirement at the age of 70." Hearings Before the House Committee on the Civil Service, 77th Cong., 1st Sess. 43 (1941).

The necessity for the compulsory nature of this retirement system was, indeed, earlier related to Congress by J. Clawson Roop, Director of the Bureau of the Budget, during the Senate Appropriations Committee's consideration of the Economy Act of 1932, Pub. L. 72-212, 47 Stat. 404:

"The great difficulty is that a man passes a physical examination, and a mental examination, and still is reaching the state where, when he starts to concentrate, he may drop off to sleep, and take a little nap before he gets through with the job. He does not do as much work by a long shot as a younger, more vigorous man would." Hearings Before a Subcommittee of the Senate Committee on Appropriations, 72nd Cong., 1st Sess. 78 (1933).

The advantages and rationale behind a mandatory retirement system were further emphasized by the Cabinet Committee on Federal Staff Retirement Systems:

"The concept of involuntary retirement is that it provides an orderly and humane means of releasing personnel after a substantially full work-life and at an age when it may be presumed their efficiency and productivity are either already impaired, or about to become so because of infirmity. It has been justified in terms of maintaining a workforce of optimum capability, creating opportunity for the less senior members of the staff, obviating the need for the employee to adjudicate numerous borderline cases of superannuation, removing the indignity or stigma associated with the preferment of charges, and enabling the prospective retiree to plan ahead with certainty."

S. Doc. No. 14, 90th Cong., 1st Sess. 73 (1967).

See, also 59 Cong. Rec. 6362.

It is, therefore, readily apparent that the constitutional and statutory provision for mandatory retirement from the judiciary is firmly founded upon a rational basis, i.e. the promotion of the efficiency of public employees and the provision for the material welfare of those employees. Moreover, even were the rational basis for mandatory retirement less obvious and subject to diverse opinion, the judgment of the Legislature as to its necessity would be controlling. As recently stated by the Supreme Court in Jefferson v. Hackney, 406 U.S. 535, at 551 (1972):

"[W]e re-emphasize what the Court said in Dandridge v. Williams, 397 U.S., at 487:

"We do not decide today that the [state law] is wise, that it best fulfills the relevant social and economic objectives that [the State] might ideally espouse, or that a more just and humane system could not be devised. Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly including the one before us. But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court ... [T]he Constitution does not empower this Court to second-guess state officials charged with the different responsibility of allocating limited public welfare funds among the myriad of potential recipients."

The duties of a judge are too vital to ignore the legitimate purpose of mandatory retirement -- to insure a fit judiciary.

B. Strict scrutiny does not apply to age retirement provisions

Simply because appellants Zichello and Nusbaum were elected judges does not bring "strict judicial scrutiny" and the compelling state interest test into play. Their election is not at issue. This case involves simply an alleged right to continued public employment. Such employment is not a "fundamental right." Cafeteria Workers v. McElroy, 367 U.S.

886, 896 (1961); Arnett v. Kennedy, supra.

To briefly answer appellants' claims:

(1) Mandatory retirement at age 70 cannot be said to violate First Amendment rights.

As stated by the District Court in Weiss v. Walsh, 324 F. Supp. 75, 77 (S.D.N.Y. 1971), aff'd. 461 F. 2d 846 (2d Cir., 1972), cert. denied, 409 U.S. 1129, wherein plaintiff challenged the refusal of Fordham University to afford him the professorship solely on the grounds that he was over 65 years of age.

"Where denial of employment has been held to violate the First Amendment, it is not because the Amendment protects jobs, even academic ones; it is rather that it prevents the conditioning of employment on some non-exercise of speech or associational rights. United States v. Robel, 389 U.S. 258, 98 S.Ct. 419, 19 L.Ed. 2d 508 (1967); Greene v. McElroy, 360 U.S. 474, 19 S.Ct. 1400, 3 L.Ed. 2d 1377 (1959). \*\*\* Notwithstanding great advances in gerontology, the era when advanced age ceases to bear some reasonable statistical relationship to diminished capacity or longevity is still future. It cannot be said therefore, that age ceilings upon eligibility for employment are inherently suspect, although their application will inevitably fall unjustly in the individual case. \*\*\*

On its face, therefore, the denial of a teaching position to a man approaching seventy years of age is no constitutionally infirm.\*

Accordingly, the courts have on many occasions upheld provisions relating to the mandatory retirement of employees; McIlvaine v. Pennsylvania State Police, supra, 6 Pa. Cmwlth. 505, 296 A. 2d 630 (1972), aff'd, 309 A. 2d 801 (1973), app. dism., 415 U.S. 986 (1974); Air Line Pilots Ass'n Int'l. v. Quesada, 276 F. 2d 892 (2d Cir., 1960), cert. denied, 366 U.S. 962 (FAA regulation prohibiting commercial air carriers from utilizing pilots over age sixty); Armstrong v. Howell, 371 F. Supp. 48 (D. Neb. 1974) (County regulation requiring mandatory retirement of civil service employees at age sixty-five); Retail Clerks Union, Local 770 v. Retail Clerks Int'l Ass'n, 359 F. Supp. 1285 (C.D. Calif. 1973) (union by-laws providing for the mandatory retirement at age sixty-five of officers and employees). In consequence, appellants' assertion that there exists a constitutionally protected right to continued public

\*It is interesting to note that both the federal government and New York in prohibiting age discrimination in employment placed 65 as an upper limit. 29 U.S.C. §§ 621, 631; N.Y. Executive Law § 296(1) and 3-a.

employment which may be affected by the state only if there is demonstrated a compelling need or interest, even though there is otherwise manifestly present a rational basis for the challenged statutory provision, must be rejected. Simply stated, appellants' contention that the State Constitution and Judiciary Law is subject to strict judicial review, is without merit. McIlvaine v. Comm. of Pennsylvania, supra.

(2) Mandatory retirement is not based on an irrebuttable presumption. Any such claim is without merit.

While the Supreme Court in Reed v. Reed, 404 U.S. 71 (1971); Frontiero v. Richardson, 411 U.S. 677 (1973); Vlandis v. Kline, 412 U.S. 441 (1973); and Cleveland Bd. of Education v. LaFleur, 414 U.S. 632 (1974), has indicated that "irrebuttable" presumptions based upon suspect criteria or which bear upon fundamental rights are to be held to a higher standard than that of merely promoting administrative convenience, it has nevertheless, held that many classifications are not to be so strictly considered. Kahn v. Shevin, \_\_\_\_ U.S. \_\_\_, 40 L. Ed. 2d 189 (1974). Indeed, the Supreme Court in Frontiero v. Richardson, supra at 686, expressly distinguished between classifications based on such "nonsuspect" criteria as

"intelligence or physical disability" from those premised on factors such as "sex", "race", or "national origin." Moreover, classifications based upon the "nonsuspect" criteria of age have been consistently upheld by the courts in the area of mandatory retirement or the conditions of employment.

McIlvaine v. Pennsylvania State Police, supra (1973), app. dism., \_\_\_\_ U.S. \_\_\_\_ (1974); Weiss v. Walsh, supra; Air Line Pilots Ass'n Int'l v. Quesada, supra; Armstrong v. Howell, supra; Retail Clerks Union, Local 770 v. Retail Clerks Int'l Ass'n, supra.

Relevant regarding the permissibility of presumptions in the enactment of legislative classifications is the Supreme Court's decision in Williamson v. Lee Optical Co., 348 U.S. 488 (1955). In Williamson petitioner challenged Oklahoma's statutory scheme which prohibited any person, not a licensed ophthalmologist or optometrist, from fitting lenses except upon prescription of a licensed optometrist or ophthalmologist. Deferring to the judgment of the Legislature, the Court stated:

"The Oklahoma law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement. \*\*\* The legislature might have concluded that the frequency of occasions when a prescription is necessary was sufficient to justify this regulation of the fitting of eyeglasses." 348 U.S. at 487

In affirming the constitutionality of this statutory scheme, the Supreme Court further stated: "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." 348 U.S. at 488.

Actually, only "invidious" distinctions violate the Equal Protection Clause. Williams v. Rhodes, 393 U.S. 23, 30 (1968). Age provisions are not inherently suspect and providing retirement at age 70 for judges is by no means invidious. It is uniform as to the judiciary in New York.

(3) Appellant Zichello has no property interest in his public office, per se and no expectation that he could serve beyond 70.

As already set forth in Point I, supra, Judge Zichello had utterly no expectation that he was elected for a term of 10 years, and knew that his term ended in the year he reached age 70.

Gordon v. Leatherman, supra 450 F. 2d at 565, clearly states that a public elected official has no property interest of the nature the Judge purported to advance. See also Burks v. Perk, 470 F. 2d 163, 165 (6th Cir. 1972), cert. denied, 412 U.S. 905.

(4) A voter such as appellant Rubino has no constitutional right to vote for a person who can serve ten years as opposed to only to age 70. There is a legitimate state purpose involved and even in voting cases (which really have no application) the State can chose effective means to accomplish its purpose. Rosario v. Rockefeller, 410 U.S. 752, 762, ftn. 10 (1973). Thus the inquiry appellant Zichello proposes into his fitness at age 70 would be just as ineffective as the proposals rejected in Rosario, (at 762) as to test party loyalty. To examine each judge's health or capacity would mean that the senile and debilitated would continue to serve to the detriment of the administration of justice through appeals and the like. Indeed, a vigorous judiciary is a compelling state interest.

Appellants continue to cite a whole line of voting cases (Br., pp. 13-23) which have no applicability to mandatory retirement of public officials at age 70. Neither appellant Zichello nor intervenor Nusbaum, nor voter Rubino have any standing to challenge the election of Civil Court judges in New York. The Judges have already been elected and not seeking re-election. No question is raised on this appeal as to their right to stand for election.

Appellants ignore the settled law that restrictions may be placed on the ability of a person to be a candidate which would never stand constitutional challenge if applied to a voter. See Chimento v. Stark, 353 F. Supp. 1211 (D.N.H. 1973), affd. 414 U.S. 802 (applying "compelling state interest" and upholding a 7 year durational residence requirement for Governor). Kanapaux v. Ellison, \_\_\_\_ U.S. \_\_\_\_, judgment affirmed, 43 L.W. 3238 (10/22/74). (South Carolina 5 year residency requirement for Governor).

Of course being over 70 does not give a voter any right to vote for a particular person as Judge. The State of New York can set various requirements for office. Besides retirement at 70, N.Y. Const. Art. 6, § 25(b), a person must be a lawyer at least 5 years to be a judge of the Civil Court, Art. 6, § 20(a). There are some lawyers who may be capable of being a judge on admission to the bar and others never capable, in spite of many years at the bar, but some line must be drawn.

It is rather paradoxical that appellants cite Human Rights Party v. Secretary of State, 370 F. Supp. 921 (E.D. Mich. 1973) which upheld a minimum age to run for office. The holding at 924 was "...we find that the stricter standard is not applicable to age limitations on eligibility to run for office..." Just as states have an interest in the maturity of

its officeholders, it has a similar interest in the vigor of its officeholders, and of the infusion of younger members of the Bar with fresh experience and link to the public warranting an age maximum.

POINT III

LIMITED CONTINUATION OF SUPERIOR COURT JUDGES TO AGE 76 RAISES NO SUBSTANTIAL EQUAL PROTECTION CLAIM.

The intervenor-appellant and appellant take issue with the limited provision of the New York State Constitution for continuation of service for up to 6 years of Justices of the Supreme Court and Court of Appeals, [as Supreme Court Justices], New York State Constitution, Art. 6, § 25(b), the same section which sets 70 as a maximum. As noted, the People of the State have a right to continue superior court judges, since apparently, they consider their service and experience more valuable. These are additional judicial manpower, and involves a different category of judges (A. 26). The fact that the various Appellate Divisions have assigned Civil Court judges to the Supreme Court (Const., Art. 6, § 26[g]) is purely a matter of discretion, not affecting a Civil Court judge's pay or constitutional office. Appointed Criminal Court and Court of Claims judges can also serve (§ 26[b], [g]).

It should be emphasized that extention of the certification procedure to lower court judges is a matter for the Legislature and people of the State. In 1973, there was just such a proposition or amendment to extend the process on the ballot. It was defeated. Interesting to note is the editorial comment of the New York Times, November 2, 1973; p. 40:

"Amendment No. 9 extends the mandatory retirement age for lower court judges when the real need is to revitalize the judiciary with more capable and vigorous judges. Vote No."

Even in election cases, reform, if that it really be, may be taken "one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." McDonald v. Board of Election Commissioners, 394 U.S. 802, 809 (1969), citing Williamson v. Lee Optical of Oklahoma, Inc., supra, 348 U.S. 483, 489 (1955).

#### CONCLUSION

THE JUDGMENT BELOW SHOULD BE AFFIRMED.

Dated: New York, New York  
December 9, 1974

SAMUEL A. HIRSHOWITZ  
First Assistant Attorney  
General  
A. SETH GREENWALD  
Assistant Attorney General  
Of Counsel

Respectfully submitted,  
*Louis J. Lebowitz*  
LOUIS J. LEFKOWITZ, *AB*  
Attorney General of the  
State of New York  
Attorney for Appellees  
Ghezzi and Pro Se

STATE OF NEW YORK )  
: SS.:  
COUNTY OF NEW YORK )

SUSAN D. CHIECO , being duly sworn, deposes and  
says that he is employed in the office of the Attorney  
General of the State of New York, attorney for Appellees  
herein. On the 11th day of December , 1974 , she served  
the annexed upon the following named persons :

STEPHEN GILLERS 250 Broadway New York, N.Y. 10007	SAMUEL GOTTLIEB Gainsburg, Gottlieb Leviton & Cole 122 East 42nd Street New York, N.Y.	ADRIAN P. BURKE Corporation Counsel Municipal Bldg. New York, N.Y. 10007
MILLER, SINGER, MICHAELSON & RAWES 555 Madison Avenue New York, New York 10022		

Attorney in the within entitled action by depositing  
a true and correct copy thereof, properly enclosed in a post-  
paid wrapper, in a post-office box regularly maintained by the  
Government of the United States at Two World Trade Center,  
New York, New York 10047, directed to said Attorneys at the  
address eswithin the State designated by them for that  
purpose.

Susan D. Chieco

Sworn to before me this  
11th day of December , 1974

P. L. Hennwald  
Assistant Attorney General  
of the State of New York